

## **WIGMANS v AMP LIMITED & ORS (S67/2020)**

Court appealed from: Court of Appeal of the Supreme Court of  
New South Wales  
[2019] NSWCA 243

Date of judgment: 8 October 2019

Special leave granted: 17 April 2020

In May 2018 a representative proceeding under Part 10 of the *Civil Procedure Act 2005* (NSW) (“the CPA”) was commenced against AMP Limited by Ms Marion Wigmans (“the Wigmans proceeding”), in relation to losses incurred by shareholders as a result of alleged misconduct by AMP. The proceeding is of a type known as an open class action, with persons rendered group members of the action by virtue of their having invested in AMP within a certain period.

Ms Wigmans faced competition however from four similar proceedings, each of which was commenced by a different lead plaintiff. The respective plaintiffs each applied for orders that the other four proceedings be stayed. One such plaintiff was Komlotex Pty Ltd, the Second Respondent to the appeal in this Court, which commenced its class action (“the Komlotex proceeding”) one month after the commencement of the Wigmans proceeding.

On 23 May 2019 the primary judge, Ward CJ in Eq, ordered that three of the proceedings, including the Wigmans proceeding, be permanently stayed. Her Honour also ordered that the fifth proceeding, which had been commenced by Fernbrook (Aust) Investments Pty Ltd, be consolidated with the Komlotex proceeding, leaving the latter (in its consolidated form) as the only class action to progress. This was after finding that the modelling of costs and returns had indicated that, on most scenarios, the net return for group members of the Komlotex proceeding would likely be the highest or around the highest. The primary judge’s orders were expressed as having been made pursuant to ss 67 and 183 of the CPA and the inherent power of the Supreme Court of New South Wales. (Ms Wigmans and the two lead plaintiffs of the other proceedings which were permanently stayed were all group members of the Komlotex proceeding.)

The Court of Appeal (Bell P, Macfarlan, Meagher, Payne and White JJA) granted Ms Wigmans leave to appeal, on one of three grounds put forward by her. Their Honours unanimously dismissed the resulting appeal, however, finding that the primary judge had taken into account relevant considerations and had not erred in exercising the judicial discretion vested by the CPA. The Court of Appeal unanimously refused Ms Wigmans leave to appeal on proposed grounds which targeted the primary judge’s assessment of comparative hypothetical returns to group members of the competing proceedings, finding that those proposed grounds raised no issue of principle.

The Court of Appeal held that the Komlotex proceeding could not constitute an abuse of process based on it and the Wigmans proceeding having common

parties, since group membership did not equate with party status. This was because group members were free to opt out, in which event they would not be bound by the outcome of the relevant proceeding (and they would each be free to institute a proceeding of their own against AMP). Their Honours also held that an open class action was not, on account of its having been filed first, in such a position that competing plaintiffs needed to establish that the first-filed action was a “clearly inappropriate” vehicle in order for it to be stayed. Additionally, the sequence of initial filing of competing proceedings became a less relevant consideration where the proceedings were commenced within a short time of each other.

The grounds of appeal are:

- The Court of Appeal erred in failing to find that Part 10 of the CPA did not authorise the approach taken by the primary judge to the determination of the cross-stay applications between Ms Wigmans and Komlotex concerning multiple, duplicative open class actions.
- The Court of Appeal erred in refusing to grant leave to appeal in respect of whether the primary judge erred by acting upon the assumption that the proceedings by each of Ms Wigmans and Komlotex had an equal probability of achieving each possible settlement or judgment outcome within the range of possible outcomes, and should have found that in doing so the primary judge had erred.